FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
General Counsel Norton
Staff Director Pehrkon

FROM: Office of the Commission Secretary

DATE: December 19, 2001

SUBJECT: Statement of Reasons for MURs 5017 and 5205

Attached is a copy of the Statement of Reasons for MURs 5017 and 5205 signed by Commissioner Darrly R. Wold.

This was received in the Commission Secretary's Office on Tuesday, December 18, 2001 at 4:03 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Southwest Publishers	)	
	)	**MURs 5017 and 5205**
	)	

STATEMENT OF REASONS OF COMMISSIONER DARRYL R. WOLD

This enforcement matter against Southwest Publishers first came before the Commission earlier this year. At that time, the Commission approved the General Counsel's recommendation to find reason to believe that Southwest Publishers violated the Act, but because the amount involved was so small, to exercise our prosecutorial discretion to send an admonishment letter, take no further action, and close the file. That action was consistent with the Commission's practice in cases where it appears there may have been a violation of the Act, but the amount involved is too small to be worth using Commission resources to pursue.

When Southwest Publishers received the admonishment letter informing it of the Commission's action, it sent the Commission a letter contending that it had not violated the Act, provided material substantiating that contention, and asked the Commission to, in effect, rescind its action. The General Counsel recommended that we not do so, and the Commission approved that recommendation. I opposed that recommendation.

This Statement of Reasons explains why I opposed the General Counsel's recommendation. I believe that in cases where the Commission has found reason to believe, sent an admonishment letter, and closed the file without taking further action, the Commission should be willing to rescind that reason to believe finding if the Commission subsequently learns that the finding was mistaken, as a matter of fact or of law. In this matter, Southwest Publishers provided the Commission with information showing that our finding was mistaken, so we should have rescinded it. This Statement also explains my reservations in general about the Commission's practice of finding reason to believe, sending an admonishment letter, and then closing the file. By doing so, the Commission uses the reason to believe finding not for its statutory purpose as a predicate to begin an

investigation (see 2 U.S.C. § 437g(a)(2)), but instead for the purpose of expressing the Commission's opinion both on the public record, and to the particular respondent in the admonition letter, that a violation may have occurred. I question whether that use of the reason to believe finding is permissible under the statute, and whether that practice is fair to respondents, especially to those who may not have an adequate opportunity to first demonstrate to the Commission that no violation has occurred.

Because this particular case illustrates the pitfalls of this practice, and in particular the unfairness to the respondent, it is worth recounting the procedural history and underlying facts in a little more detail.

This action against Southwest Publishers[1] arose in the context of an audit of the Friends of Ronnie Shows, a campaign committee registered with the Commission (the Shows Committee). The audit resulted in a referral of a number of possible violations to the Office of General Counsel, of which the alleged violation by Southwest Publishers was a part.[2] The audit identified a number of contributions reported by the Shows Committee from entities that the secretary of state's office showed were registered as corporations. Among these was Southwest Publishers, from which the Shows Committee had received $100.00.

Accordingly, the General Counsel recommended that the Commission find reason to believe that those entities, including Southwest Publishers, violated 2 U.S.C. § 441b(a) of the Act (the prohibition against contributions by corporations and other entities). Because the amounts in each case were relatively small, however, the General Counsel also recommended that the Commission, in the exercise of its prosecutorial discretion, take no further action, send an admonishment letter, and close the file with respect to each of those respondents. (See First General Counsel's Report, dated May 14, 2001, pages 17-18.) On May 22, 2001, the Commission unanimously approved those recommendations. The admonishment letter to Southwest Publishers, dated June 29, 2001, stated, among other things, that:

> On May 22, 2001, the Federal Election Commission found reason to believe that Southwest Publishers, Inc. violated 2 U.S.C. § 441b(a), a provision of the Federal Election campaign Act of 1971 . . .. [¶] The Commission reminds you that making a corporate contribution is a violation of the Act. You should take steps to ensure that this activity does not occur in the future. . . . [¶] The file will be made public within 30 days after this matter has been closed . . .."

[1] The respondent's full correct name appears to be Southwest Publishers, Inc., but the respondent was named as Southwest Publishers in the Commission's proceedings.

[2] The audit referral was processed by the Commission in conjunction with an outside complaint filed against the Shows Committee. Southwest Publishers was not named in the complaint, but only in the audit referral.

Southwest Publishers apparently first became aware that it was the subject of Commission action when it received the admonishment letter and an accompanying factual and legal analysis explaining that the basis for the finding was that the Shows Committee had reported receiving a $100 contribution from Southwest Publishers.

In response, Southwest Publishers sent a letter dated July 2, 2001 to the Commission, explaining that its payment of $100.00 to the Shows Committee was a refund of an overpayment by the Shows Committee for advertising published in Southwest Publishers' newspaper, and was not a contribution. The letter was accompanied by a copy of Southwest Publishers' account for the Shows Committee, showing billings for advertising, payments by the Shows Committee, and a refund of $100.00 to the Committee. The explanation and material submitted by Southwest Publishers appeared credible and conclusive on the issue. It left the Commission with no reason to believe that Southwest Publishers had made a contribution to the Shows Committee.

The letter from Southwest Publishers also asked that "a correction to the record be made, our name removed from the public record, our name cleared" and a clarifying letter be sent. In response, the General Counsel advised the Commission that this would require reopening the matter and rescinding the reason to believe finding. The General Counsel recommended instead that "because there appeared to be reason to believe that a violation had occurred at the time the Commission made its finding . . . the Commission not reopen the matter." The General Counsel also recommended that the Commission authorize sending a letter to Southwest Publishers "explaining the meaning of a reason to believe finding," among other things. (See General Counsel's Report #2, July 31, 2001.)

At the Commission meeting of August 14, 2001, I moved to reopen the file, rescind the reason to believe finding, send an appropriate letter to Southwest Publishers, and then again close the file. That motion failed on a vote of 2-3, with Commissioner Smith joining me in voting in the affirmative. I subsequently voted against the General Counsel's recommendation to not reopen the matter and approve an appropriate letter. That recommendation was adopted on a vote of 4-1, with one abstention.[3]

The subsequent letter from the General Counsel's office to Southwest Publishers gave Southwest Publishers cold comfort. Among other things, it said:

> "On August 15, 2001 [sic] the Commission reviewed your letter and determined not to reopen this matter. The Commission's decision reflects the fact that a finding of reason to believe was made on the basis of the information available to the Commission at that time. . . . Reason to believe is only a preliminary finding and is a statutory prerequisite to an investigation to ascertain whether there is probable cause to believe a

[3] The vote on the General Counsel's recommendation was the pre-meeting tally vote, which stood as the vote of the Commission after my motion failed. Chairman McDonald was absent at the meeting.

violation has occurred. Thus, a finding of reason to believe does not constitute a determination by the Commission that a violation has occurred. . . . [T]he information you provided will be placed on the public record."

Southwest Publishers is left to ponder the distinction between the Commission's finding on May 22, 2001 that it had reason to believe that Southwest Publishers violated 2 U.S.C. § 441b(a), and the Commission's statement in its letter that "a finding of reason to believe does not constitute a determination . . . that a violation has occurred." There is in fact a fine legal distinction, but that distinction is undoubtedly lost on anyone not intimately familiar with the somewhat arcane procedures of the Commission, which are mandated in large part by the enforcement procedures imposed on the Commission in 2 U.S.C. § 437g. That distinction is not likely to be apparent to most respondents who find themselves in the same position as Southwest Publishers, or to most members of the public who become aware of such an action by the Commission.[4]

We should have rescinded the reason to believe finding against Southwest Publishers, because it was mistaken, and because no other steps adequately remedied that mistake.

I also want to elaborate on my views on the Commission's use of the procedure of finding reason to believe and concurrently closing the file, in general.

First, I think there is substantial doubt that the procedure is a permissible use of the reason to believe finding under the Act. The only purpose of a reason to believe finding where the Commission concurrently closes the file is to send a message to the respondent that, in the Commission's opinion, there is, literally, "reason to believe" that the respondent violated the law, and to put that expression of the Commission's opinion on the public record. Section § 437g(a)(2) of the Act, however, establishes the "reason to believe" finding as a predicate to an investigation, providing in relevant part:

"If the Commission, upon receiving a complaint . . . or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its

[4] Southwest Publishers would probably also not understand any distinction between its situation and that of another corporate respondent in this case, Langston/Frazer Properties. Langston/Frazer likewise was internally generated as a respondent in the audit referral, and on May 22, 2001 the Commission likewise found reason to believe that it violated § 441b(a) for having made an impermissible corporate contribution to the Shows Committee. Just before the notification letter went out to Langston/Frazer, however, the General Counsel's office discovered that the Shows Committee had timely refunded the contribution from Langston/Frazer, thereby curing the violation. By a memorandum to the Commission dated June 22, 2001, the General Counsel recommended that the Commission rescind its reason to believe finding against Langston/Frazer, and that recommendation was approved by the Commission. There does not appear to be any distinction between Langston/Frazer and Southwest Publishers that should result in the disparate treatment accorded these two respondents.

members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act . . . the Commission shall . . . notify the person of the alleged violation. . . . The Commission shall make an investigation of such alleged violation . . .."

While the issue is not entirely clear, I think that the most appropriate reading of this provision is that the purpose of the finding is to establish the justification for opening an investigation. This reading is reflected in the Commission's regulations, which provide, in 11 C.F.R. § 111.10:

"An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation...has occurred..." [Emphasis added.]

Absent a clear statutory authorization to use that finding for some other purpose -- e.g., to simply express the Commission's opinion that there may have been a violation of the law, to the respondent and to the public -- I have substantial reservations about the legal basis for doing so.[5]

I also have substantial reservations about finding reason to believe and concurrently closing the file because of the possible unfairness of that procedure to respondents.

When the Commission closes the file at the same time as it finds reason to believe, it cuts off any further argument by the respondent, including the ability to bring any further facts to the Commission's attention that might exonerate the respondent. Thus, mistaken findings will be left not only in the mind of the respondent, but on the public record. In the particular case of Southwest Publishers, the mistaken finding was understandably offensive to the respondent, but there is nothing to indicate that the facts of the case, involving a private company and $100.00, will be of any interest to the general public. But the Commission from time to time follows the same procedure of finding reason to believe and closing the file without further action in other matters where the respondents are more visible participants in the political process. In those instances, the finding may be of significant concern to the respondent because of the potential for use by a political opponent. What may only be offensive to Southwest Publishers in this case can be actually damaging to a respondent in a more public position.

There may be less risk of error in finding reason to believe and closing the file in a matter generated by an outside complaint, where the Commission, by statute, cannot find

[5] Limiting the use of a finding of reason to believe to those cases where the Commission also proceeds to open an investigation would not appear to preclude the Commission from taking some other appropriate action in cases where it appears there may have been a violation -- possibly sufficient to justify a reason to believe finding -- but the Commission does not wish to use resources to pursue the matter. In such cases, it may be appropriate for the Commission to send a letter to the persons involved, advising that information has been brought to the Commission's attention which, if true, may indicate that a violation of the Act occurred, but that the Commission has elected to take no further action in the particular instance.

reason to believe until the respondent has received a copy of the complaint and has had an opportunity to respond, including presenting any exonerating facts or arguments to the Commission. (See 2 U.SC. § 437g(a)(1).) Even in that situation, however, there is a risk that the Commission will make that finding where in fact there is no violation. Complaints are not required to be models of pleading, and are often written by lay persons who only generally describe the events that they believe violate the law. The Commission will construe those complaints liberally, and scrutinize them to determine what violations of law they suggest. Respondents are in the position, however, of having to respond to the complaint without first having the benefit of the Commission's view of the complaint. Responses thus may not completely address every potential violation that the Commission subsequently identifies, especially where the respondent is not advised by any legal counsel, or is advised by counsel who is not experienced with the technical provisions of the Act and the Commission's regulations.

The risk of an erroneous reason to believe finding is substantially increased when the Commission makes such a finding in an internally-generated matter. The respondent in such a case will not have had any notice that the Commission is considering taking any action concerning it, so will of course not have had the opportunity to present any exonerating facts or arguments to the Commission. That was the case with Southwest Publishers in this matter.

I would like to see the Commission abandon its practice of using the reason to believe finding as a routine method of expressing its opinion that there has been a violation of the Act, in cases in which the Commission concurrently closes the file. If the Commission continues that practice, the Commission should be willing to rescind the reason to believe finding where facts or arguments are subsequently presented to the Commission credibly showing that there was in fact no violation.

Until the Commission is prepared to do so, I will generally not be willing to find reason to believe where we concurrently close the file, in internally-generated matters.

In the case of complaint-generated matters, doubts about the statutory authorization for using the reason to believe finding for a purpose other than opening an investigation, and the risk of error by the Commission even in such cases, at least dictate a high level of caution in following that procedure in such cases. The better practice would be to abandon that procedure entirely and make reason to believe findings only in cases that are serious enough to pursue to the next stage.

December 17, 2001

Darryl R. Wold, Commissioner